Helen S. Gilbert
hgilbert@gwtxlaw.com

Gilbert Wilburn, PLLC
ATTORNEYS AT LAW

Randall B. Wilburn, P.E.
rbw@gwtxlaw.com

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Via Email: Brian.Sierant@tceq.texas.gov
Mr. Brian Sierant
Water Quality Division
Texas Commission on Environmental Quality, MC 150
P.O. Box 13087
Austin, Texas 78711-3087

Re: Stakeholder Comments on Changes to 30 TAC Chapter 312

Dear Mr. Sierant:

In response to the public stakeholder meeting held by the Texas Commission on Environmental Quality ("TCEQ" or "Commission") on October 30, 2017 and the Executive Director's solicitation of public comment, on behalf of small business septage registrants, Santa Rita Land & Cattle Holdings, Ltd. and Comal Ag Operations, LLC ("Commenters"), we provide the following public comments:

I. Background

On October 30, 2017, the Executive Director held a Biosolids Stakeholder meeting to solicit public comment on forthcoming changes to title 30 Texas Administrative Code chapter 312 – the TCEQ's biosolids or sludge rules. The Executive Director stated that the future rulemaking was a necessary "clarification" or "update" to older rules that do not reflect his current interpretation on several issues. In fact, slides were presented at the meeting that showed only six (6) rulemakings in the past 24 years, a shortage upon which the Executive Director apparently now relies to justify his present rulemaking. In reality, according to the TCEQ's own records, there have been 15 rulemakings over this period. Importantly, this included the promulgation of rules in 2003 that incorporated House Bill 2912's then-new permitting requirements for the land application of Class B sludge and a thorough chapter-wide rulemaking just three (3) years ago in 2014.

What this means is that the Commission has had ample opportunity in the recent past to impose an individual permit requirement on domestic septage appliers -- which is one of the several issues the Executive Director is now addressing in his current rulemaking -- and chose not do so. Just this past summer during the 85th Legislative Session, both SB 1724 and HB 3642, which would have imposed a permit requirement on the land application of septage, failed to be passed out of their respective committees. There was no statewide support for an individual permit requirement then and there is no need to take the same industry-harming action through rulemaking now. To suddenly require a permit when a registration has sufficed for over two (2)

decades could also create an argument that the past program was inadequate jeopardizing TCEQ's legal authority to carry out the federal NPDES program.

Similarly, most if not all the other issues raised by the Executive Director at the Biosolids Stakeholder meeting relating to buffer zones, storage and harvesting could be addressed through consistent interpretation by TCEQ's permitting, compliance and enforcement staff or updated regulatory guidance and do not warrant a formal rulemaking. However, should the Executive Director proceed anyway, Commenters specifically oppose any amendment that would: 1) impose an individual permit on previously registered activities, including the addition of alkali or lime at a registered site; 2) apply a buffer zone *after* the initial authorization is issued (at renewal, amendment or at any other time); 3) redefine harvesting and define shredding in such a way that sites cannot mulch fields or perform basic management practices without the threat of enforcement; and, 4) require Executive Director approval for storage of septage in a fully enclosed vessel. To that end, set forth below, Commenters propose specific rule language to amend § 312.44(c)(2)(D) (buffer zones), § 312.50(a) (storage), § 312.82(c)(2) (pathogen reduction) and § 312.83(b)(12) (vector attraction reduction) for consideration.[1]

II. Buffer Zone

A. Comment

Commenters request the adoption of an amendment to 30 TAC § 312.44(c) to clarify that the 750-foot buffer zone does **not** apply to structures when they are built, moved, or relocated or otherwise occupied on a property for the first time within 750-feet of a sludge or septage application area *after* an initial registration or permit is issued. Unfortunately, recent events suggest that the Executive Director intends to interpret the buffer zone rule inconsistent with long-standing Commission policy, interpretation, and practice. Commenters seek clarification so any misinterpretation, misapplication, or both cannot occur in the future to the detriment of hundreds of sludge or septage sites as well as to multiple other program areas regulated by the Commission that are currently subject to buffers, setbacks, and easement requirements.

Currently the buffer zone provision in the Commission's sludge rules, 30 TAC § 312.44(c)(2)(D), provides the following:

> (c) When bulk sewage sludge that does not meet Class A pathogen requirements or domestic septage is applied to agricultural land, forest, or a reclamation site, buffer zones must be established for each application area as noted in this section unless otherwise specified by the commission.
>
> (2) Other buffer zones:
>
> (D) 750 feet, ***established*** school, institution, business, or occupied residential structure;[2]

[1] Commenters do not propose draft rules for harvesting/shredding as none are needed.

Despite the Executive Director's slide presented during the Biosolids Stakeholder meeting that (the buffer is) "currently re-evaluated upon renewal or major amendment," this has *not* been the Commission's policy for at least the last 22 years. On the contrary, the Commission's long-standing and multi-media policy has been to apply the 750-foot buffer zone only at the time of the permittee's or registrant's initial application for authorization from the Commission. The Commission has never applied the subsection (D) buffer from a site to a house that was built or relocated onto property within 750 feet of an application area *after* the site's permit or registration was issued. The consistent policy of the agency has been that such buffer does not apply when a residence is established *after* the issuance of the permit or registration, where the neighborhood "grew up" around the authorized site. Furthermore, the Commission's policy has also *not* been to re-evaluate or retroactively apply the buffer zone at the time of renewal or after any amendment to the underlying permit or registration either. This erroneous position was only embraced recently and only with respect to Commenters' specific site. Commenters are aware of no case – in the sludge program or any other air, water or waste case – where a registrant or permittee was forced to change or reduce the size of its authorized site as a result of a changing buffer do to a later-occupied structure.

As the Executive Director is aware with respect to Commenters' Guadalupe County site, the new neighbor requested that the TCEQ apply the 750-foot buffer for the first time to their mobile trailer intentionally parked at the fence line several months *after* the issuances of Commenters' registration (Registration No. 711013). During the comment period for the then-pending application in August 2015, the Executive Director correctly dismissed[3] the neighbor's comments that they planned, "to break ground on our dream home in 2016 . . . [t]he proposed site would be within the necessary 750ft of the build site." Whether a "dream home" or a temporary trailer is immaterial – neither dwelling was "established" at the time of the application submittal or issuance of the Commenters' registration in February 2016. Instead the pastureland was unimproved with no habitable buildings. Where a residence moves in after-the-fact in this manner, a permittee or registrant currently has no legal obligation to apply a 750-foot buffer under 30 TAC § 312.44(c)(2)(D).

Additionally, where a later-occupied structure is mobile, like a trailer, to re-evaluate and apply the buffer later only facilitates mischief. That is, if the TCEQ changes its long-standing policy that the buffer is determined at the time of initial authorization but applies the buffer later, *any* neighbor could move *any* mobile or portable dwelling into the buffer at *any* time. Would the TCEQ require the registrant or permittee to then move his or her own structures, fixtures, flags and equipment every time the mobile residence is moved? If this triggered a decrease in the

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[2] 30 TEX. ADMIN. CODE § 312.44(c)(2)(D)(emphasis added).

[3] The Executive Director specifically stated in his Technical Summary to the Registration, ***"At the time the registration is issued***, the registrant must have a minimum 750-foot buffer zone between the land application area and any occupied residence. Based on TCEQ's review of the application, ***the registrant meets all buffer zone requirements***."

available acres for land application would a new application rate need to be calculated every time a mobile residence is moved forcing the expensive and time-consuming preparation and submittal of an amendment application? Like marionette puppets, neighbors objecting to biosolids sites could manipulate this process to force registrants and permittees to constantly dance on their strings, changing their site boundaries and all that entails. Such affected registrants and permittees could be in a constant state of amendment costing untold tens of thousands of dollars.

The use of the past tense of the word "established" in both 30 TAC § 312.44(c)(2)(D) and standard registration provisions, make it clear that the residence must have already been established, or exist, at the time the Commission issues the initial registration. That is, sometime in the past, just as the Executive Director noted in his Technical Summary in Commenters' case. Pursuant to the rules of statutory construction, which are applicable to regulatory construction as well, the reader must presume that the Commission included every word of a statute or rule for a purpose.[4] Thus, the Commission is not permitted to read out the word "established" from 30 TAC § 312.44(c)(2)(D). Similarly, when the Legislature uses a word or phrase in one portion of a statute, but excludes it from another, as it did with buffers around public water supplies, then the Commission cannot imply the term from the statute where the Legislature has excluded the term.[5]

There is clear regulatory intent in 30 TAC § 312.44(c)(2)(D), that the 750-foot buffer applies to schools, institutions, businesses, or residences that exist at the time of application. Also, it is important not to lose sight of the purpose of buffers generally as they apply in the context of septage application. Because advanced treatment is achieved in the OSSF, land applied septage basically meets Class A requirements in terms of quality virtually eliminating pathogens and odor before land application (*i.e.*, like "dillo dirt" sold at a local garden store). Thus, application of a 750-foot buffer will not make fully treated septage less odorous, it simply is not that odorous in the first place. Buffering, as with other sanitary easements and set-backs that the Commission imposes on other regulatory entities, relates to the protection of surface water.

The preamble to the Commission's 1995 rules, the first substantive sludge and septage rulemaking implementing 40 CFR Part 503, made it clear that the buffer is triggered when and if a residence exists at the time of application:

> Proposed new § 312.44, Management Practices, establishes practices that must be followed when sewage sludge or domestic septage is applied at a land application site. . . [m]inimum buffer zone distances are established from where sludge can be applied to water in the state; to a private and public water supply well; to conduits to groundwater; to ***existing*** schools, institutions, residences or businesses; to a property boundary or public right-of-way; and to irrigation conveyance ditches in cases where sewage sludge is both incorporated into the soil within 48 hours of application and a vegetated cover is established between the application area and

[4] *Laidlaw Waste Sys. (Dallas), Inc. v. City of Wilmer,* 904 S.W.2d 656, 659 (Tex.1995).

[5] *Id.*

> all adjacent surface waters, sewage sludge may be applied up to 33 feet from surface waters.[6]

"Establish" as defined by Webster's Dictionary is to "order, ordain, or enact (a law, etc.) *permanently*." Thus, the Commission's past and current interpretation that a 750-foot buffer cannot be imposed on a residence built or relocated *after* the consideration of the application and the issuance of the initial Registration is also consistent with previous positions of the Commission's Legal Division. In Commenters' case, after he filed his response to public comment, the Executive Director's legal staff elaborated that no minor amendment would be warranted in the future should the neighbors commence construction of their "dream home" within 750 feet of Commenters' application area. In fact, the Executive Director's legal staff explicitly stated:

> **You are correct, the *buffer zone is not re-calculated* if someone comes in next year and builds their "dream" home.**[7]

The Executive Director should not change his position after-the-fact with respect to Commenters or any other regulated entity.

At the time the Commission promulgated the 1995 sludge rules, it is also important to note that TCEQ's predecessor, the Texas Natural Resource Conservation Commission, was limited to applying *only the rules that were in place at the time a permit or registration application was filed*:

> The approval, disapproval, or conditional approval of an application for a permit shall be considered by each regulatory agency *solely on the basis of any orders, regulations, ordinances, or other duly adopted requirements in effect at the time the original application for the permit is filed*. If a series of permits is required for a project, the orders, regulations, ordinances, or other requirements in effect at the time the original application for the first permit in that series is filed shall be the sole basis for consideration of all subsequent permits required for the completion of the project.[8]

Although the uniformity provisions were later repealed[9] after the Commission adopted the Chapter 312 buffer zone provisions, application of prevailing law would have looked only at any residences that existed (preamble language) or were established (rule language) at the time the

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[6] 20 TEX. REG. 3296 (emphasis added).

[7] *See* December 16, 2015 email correspondence between Helen Gilbert and Bob Brush, attached hereto as Exhibit A (emphasis added).

[8] TEX. GOV'T CODE ANN. §§ 481.141-.143 (emphasis added).

[9] Repealed by Act of June 1, 1997, 75th Leg., R.S., ch. 1041, § 51(b), 1997 Tex. Gen. Laws 3966.

Commission initially issued a permit or registration. The Supreme Court of Texas interpreted the effect of these uniformity provisions to "*locking in for the life of a project* the regulations in effect at the time of the application for the project's first permit."[10] And that is exactly how the Commission has applied this provision for the last 22 years or so. To now apply the buffer after-the-fact even at amendment stage belies the significant investments the regulated community makes in their facilities, not only in sludge sites but landfills, wastewater treatment plants ("WWTPs") or any other regulated facility which is subject to buffers, setbacks or easements. And to apply a buffer retroactively at the renewal stage is simply illogical, since a renewal by definition only applies to identical operations. This is nothing more than changing the rules in the middle of the game which inherently violates basic notions of due process.

Moreover, if the Executive Director interprets 30 TAC § 312.44(c)(2)(D) by reading the word "established" out of the rule and imposing a 750-foot buffer for a mobile trailer or any other type of residence that did not exist at the time of registration issuance, then nothing would stop neighbors from locating multiple trailers adjacent to all property lines, which would result in the inability to land apply treated septage on vast amounts of available application areas. In Commenters' case, allowing a retroactive application of the buffer would render more than 70% of the application area useless, result in regulatory takings without due process, and nullify the investment backed expectations contrary to the U.S. and Texas Constitutions. Article I, § 17 of the Texas State Constitution provides that "no person's property shall be taken, damaged or destroyed without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money . . .".[11] Such a retroactive interpretation without a Takings Impact Assessment would also be in violation of Section 2007.043 of the Texas Government Code, the Texas Private Real Property Rights Preservation Act.[12]

Beyond the legally indefensible position of imposing a 750-foot buffer after-the-fact to residences that did not exist at the time of authorization, it would also set a terrible precedent contrary to decades of Commission practice across all media. This potential misinterpretation and misapplication of the rules would impact hundreds of other sludge and septage sites in Texas. It would not only impact sludge and septage sites but any of the thousands of other regulated entities and stakeholders in Texas for which the Commission applies buffers, setbacks or easements. If not agency-wide, then the Commission would be applying the buffers retroactively only when neighbors made daily phone calls or interested legislators asserted their influence. In either case, it would be an arbitrary, capricious, and therefore unlawful application of law. Nothing would keep wily neighbors from driving legally authorized sites out of business by misusing this erroneous interpretation of the buffer, setback, and easement rules. Such interpretation would impact, at a minimum: any confined animal feeding operations; Texas land

[10] *Quick v. City of Austin*, 7 S.W.3d 109, 124 (Tex. 1999) (emphasis added).

[11] TEX. CONST. ART. I, § 17.

[12] TEX. GOV'T CODE ANN. § 2007.041 *et seq.* (requiring implications to be considered *before* the regulatory decision is made, not afterwards).

application permits ("TLAP"); discharging municipal and industrial WWTPs; individual or public groundwater wells; onsite sewage facilities (septic tanks or "OSSFs"); composts; municipal solid waste and industrial and hazardous waste landfills; certain other industrial and hazardous waste facilities; and, any facilities subject to certain air permitting requirements – literally the vast majority of sites the TCEQ regulates.

The importance of the timing of the applicability of a buffer or setback is aptly illustrated by 30 TAC § 116.615(11) relating to distance limitations, setbacks, and buffer zones for certain air permitting facilities:

> Notwithstanding any requirements in any standard permit, if a standard permit for a facility requires a distance, setback or buffer from other property or structures as a condition of the permit, the determination of whether the distance, setback or buffer is satisfied shall be made on the basis of conditions existing ***at the earlier*** of:
>
> a) the date new construction, expansion, or modification of a facility begins; or
>
> b) the ***date any application or notice of intent is first filed*** with the commission to obtain approval for the construction or operation of the facility.[13]

The application of buffers or setbacks under 30 TAC § 116.615(11) underscores the Commission's long history of evaluating the application of such buffers or setbacks at the time the authorization is granted and not afterward. Because the imposition of the 750-foot buffer after Commission issuance of a registration could result in the shuttering of Commenters' and others' sites, it would also constitute an illegal revocation of authorizations without notice and opportunity for hearing pursuant to 30 TAC § 305.66.

Therefore, to avoid these disastrous outcomes and in order to clarify that a 750-foot buffer cannot be applied to an authorized site from a structure that becomes occupied after issuance of the initial authorization, Commenters offer the following clarifying language.

B. Proposed Rule Language

Commenters propose the following language changes to the current text of 30 TAC § 312.44(c):

> c) When bulk sewage sludge that does not meet Class A pathogen requirements or domestic septage is applied to agricultural land, forest, or a reclamation site, buffer zones must be established for each application area as noted in this section unless otherwise specified by the commission. <u>The</u>

[13] 30 TEX. ADMIN. CODE § 116.615(11) (emphasis added).

> applicability of the buffer zone is determined only at the time of initial authorization.
>
> (2) Other buffer zones:
>
> (D) 750 feet, ***established*** school, institution, business, or occupied residential structure;[14]

Alternatively, the clarification could be made by inserting additional language in only subsection (D):

> c) When bulk sewage sludge that does not meet Class A pathogen requirements or domestic septage is applied to agricultural land, forest, or a reclamation site, buffer zones must be established for each application area as noted in this section unless otherwise specified by the commission.
>
> (2) Other buffer zones:
>
> (D) 750 feet, ***established*** school, institution, business, or occupied residential structure where the applicability of the buffer zone is determined only at the time of initial authorization.[15]

In sum, if TCEQ amends 30 TAC § 312.44(c)(2)(D) to apply the 750-foot buffer zone to authorized sites where structures are built, relocated or occupied within the buffer zone area *after* the authorization was issued, any time during the life of the site, including at renewal or amendment, it will be disastrous for the septage industry. Further, under such erroneous interpretation, such new procedure could be intentionally manipulated by neighboring property owners to put duly-authorized sites out of business and/or severely curtail legal operations. This after-the-fact misapplication of the buffer zone rule, as a matter of policy, could be duplicated in virtually all other program areas that the Commission regulates – like municipal solid waste landfills, WWTPs and even to the tens of thousands of groundwater wells currently protected by sanitary easements – which would be a detriment to thousands of regulated entities. In the case of Commenters, a misapplication of the buffer zone would not only put these small companies out of business, but it would also eliminate a valuable end use for septage which state policy prefers over landfilling or direct disposal at WWTPs.[16] Since the elimination of land application sites will force higher prices to maintain, pump out and haul from OSSFs, landowners would simply forego needed maintenance resulting in failing systems discharging into waters in the state. Higher prices at remaining sites or WWTPs could inadvertently force haulers to use unauthorized sites (ie., illegal dumping), which would also cause harm to human health and the environment.

[14] 30 TEX. ADMIN. CODE § 312.44(c)(emphasis added).

[15] 30 TEX. ADMIN. CODE § 312.44(c)(2)(D)(emphasis added).

[16] TEX. HEALTH & SAFETY CODE ANN. § 361.022(b).

III. Storage of Septage

A. Comment

Currently, approval to store sludge and septage for up to 90 days at a beneficial use site must be obtained by the Executive Director where the registrant or permittee must construct the storage area. As the plain language of 30 TAC § 312.50(a) shows, however, the storage areas envisioned by the rules pertain to open-air surface impoundments, not enclosed vessels for which external storage areas need not be constructed. In these cases, the vessel *is* the storage area contained within itself. Obtaining Executive Director approval would therefore be superfluous and unnecessary.

Section 312.50(a) provides the following:

> (a) Except as provided in subsection (b) of this section, storage of sludge at a beneficial land application site must not exceed 90 days. Storage is allowed only when the following requirements are carried out.
>
> (1) Written authorization must be obtained from the executive director ***prior to construction of the storage area***.
>
> (2) The storage area must be operated and maintained to prevent surface water runoff and to prevent a release to groundwater. Discharge of storm water or wastewater which has come into contact with sewage sludge is prohibited. The storage area shall be designed to collect such runoff. Any runoff collected during the storage of sewage sludge shall be disposed in a manner to prevent a release to groundwater.
>
> (3) The storage area shall be designed, constructed, and operated in a manner which protects public health and the environment.
>
> (4) The storage area must be lined to prevent a release to groundwater. Natural or artificial liners are required for leachate control. A natural liner or equivalent barrier of one foot of compacted clay with a permeability coefficient of 1×10^{-7} cm/sec or less must be provided. Various flexible synthetic membrane lining materials may be used in lieu of soil liners if prior written approval has been obtained from the executive director. The registrant shall furnish certification by a licensed professional engineer or licensed professional geoscientist that the completed storage area lining meets the appropriate criteria described in this section prior to using the facilities. The certification shall be signed, sealed, and dated by a licensed professional engineer or licensed professional geoscientist.
>
> (5) The application shall outline measures to be taken to minimize vectors and to avoid public health nuisances such as odors.
>
> (6) The storage area shall be fenced or other methods shall be used, if necessary to control access by humans or domestic animals.
>
> (7) Berms or dikes shall be constructed to contain the waste without leakage.

> (8) Liquid sludge must be stored in an enclosed vessel.
> (9) Processing of sludge is prohibited unless a permit is obtained from the commission.
> (10) In the event a person who prepares sewage sludge that is applied to the land or who applies sewage sludge to the land, is subject to an Odor Control Plan as described in § 312.44(j)(4) of this title (relating to Management Practices), that person must comply with the terms of the applicable Odor Control Plan in order to store sewage sludge at a beneficial use site.[17]

As is evident from looking at various subparts of subsection (a), the type of storage contemplated could result in runoff, groundwater contamination, odors and impact to humans and animals. This is not the case with enclosed vessels of the type Commenters maintain at their site. Fully enclosed steel vessels do not need berming to minimize runoff or clay liners to retard or prevent migration to groundwater. Because they are enclosed, they prevent the emanation of odors and contact by animals or humans. And because 30 TAC § 312.50(a) was initially promulgated in 1995 when sludge storage was in surface impoundments and not steel enclosed frac tanks, it is likely the rule writers did not foresee the need to exclude them. However, the rules could be clarified so it is abundantly clear that enclosed vessel storage of sludge/septage is exempt from the requirement to obtain Executive Director approval.

B. Proposed Rule Language

Commenters propose the following language changes to the current text of 30 TAC § 312.50(a) to clarify the exemption of storage in a closed vessel:

> a) Except as provided in subsection (b) of this section, storage of sludge at a beneficial land application site must not exceed 90 days. <u>Approval for storage of sludge in an enclosed vessel is not required. Use of excavated open impoundments for</u> storage is allowed only when the following requirements are carried out.[18]

Section 30 TAC § 312.50(a) should be amended or clarified through guidance so that it is clear that construction (and approval of construction) or use of enclosed vessel for storage of sludge or septage for more than seven (7) days need not be approved by the Executive Director.

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[17] 30 TEX. ADMIN. CODE § 312.50(a)(emphasis added).

[18] *Id.*

IV. Addition of Lime for Pathogen and Vector Attraction Reduction

A. Comment

Commenters also propose an amendment to 30 TAC § 312.82(c)(2) and 30 TAC § 312.83(b)(12) relating to alkali addition as a means to reduce pathogens and vector attraction. Currently, the addition of alkali or lime at a domestic septage site is one of several compliance alternatives to reduce vector attraction and is a required method to reduce pathogens. The requirement to use alkali or lime to reduce pathogens goes beyond the Federal 40 CFR Part 503 requirements for land application of domestic septage to non-public sites. Section 312.82(c)(2) requires:

> The pH of domestic septage applied to agricultural land, forest, or a reclamation site must be raised to 12 or higher by alkali addition and, without the addition of more alkali, must remain at 12 or higher for a period of 30 minutes.[19]

And, as an alternative for compliance for reducing vector attraction –

> The pH of domestic septage shall be raised to 12 or higher by alkali addition and, without the addition of more alkali, shall remain at 12 or higher for 30 minutes.[20]

The addition is normally performed at a registered application site to domestic septage which has been almost entirely treated previously in the OSSF from which it is generated. Contrary to the Executive Director's recent presentation at the October 30, 2017 Stakeholders' Meeting, septage from OSSFs transported to registered land application sites is not "raw septage" or "raw wastewater" but has often received advanced anaerobic or aerobic treatment while in the OSSF. Thus, the addition of lime at the site to raise the pH is not "treatment" or "processing" within the traditional meaning of those terms.

EPA's Guideline for Land Application of Septage and other EPA guidance documents confirm this understanding that, the addition of lime to septage is considered "conditioning" and does not rise to the level of treatment so as to require a permit.

> "Lime alone is a fairly popular *conditioner* for raw primary sludge…. Lime treatment to a pH of 10.4 or above has the added advantage of providing a significant degree (over 99 percent) of disinfection of the sludge according to "Water Supply and Treatment," Bulletin 211, published by the National Lime Association."[21]

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[19] 30 TEX. ADMIN. CODE § 312.82(c)(2).

[20] 30 TEX. ADMIN. CODE § 312.83(b)(12).

[21] U.S. ENVIRONMENTAL PROTECTION AGENCY, SLUDGE HANDLING AND CONDITIONING (Feb. 1978). (emphasis added).

> "Federal permits are not required for persons who apply domestic septage to non-public contact sites."[22]
>
> "Non-public contact sites include agricultural land, forests, and reclamation sites…. The land applier must manage the domestic septage so that pathogens (disease-causing organisms) are reduced…. Adjust the pH of the domestic septage so that it remains at pH 12 or greater for at least 30 minutes before land applying."[23]

Appendix B to 40 CFR Part 503 furthermore lists the types of treatment processes to reduce pathogens – both the Process to Significantly Reduce Pathogens (PSRP) and Process to Further Reduce Pathogens (PFRP) - which *are* subject to permitting (i.e., aerobic and anaerobic digestion, air drying, composting, lime stabilization, heat treatment, beta and gamma ray irradiation, pasteurization and thermophilic aerobic digestion). The addition of alkali or lime which EPA interprets as "conditioning" or "pH adjustment" does not qualify as one of these Appendix B processes. The type of alkali addition or conditioning that Commenters and many other registered septage sites conduct does not even rise to the level of lime stabilization because that requires the pH to be elevated for a minimum of 2 hours, not 30 minutes.

As previously discussed, lime addition is normally performed at registered sites, not on the trucks transporting septage. However, if land application sites face losing registrations for the decades-old practice of adding lime to septage, the obligation will be passed to others who are not on-site. Neither haulers nor homeowners are equipped to do this job. Not only does TCEQ likely lack a cohesive database of all OSSFs in the State of Texas, where treatment could occur, but recordkeeping by either homeowner or hauler would be unreliable. As a practical matter, if the addition of lime can occur at any location – at the OSSF, in the truck, or at the site per previous TCEQ policy – but this activity would now require permitting at registered land application sites, will TCEQ be requiring permitting of homeowners and septage haulers also? If the previously unpermitted activity of adding alkali would now trigger a permit for those who perform it on a land application site, why would it (i.e., the obligation to get a permit) not similarly apply to homeowners or haulers? There is no technical, legal or practical reason to change the previous interpretation of these rules.

Additionally, if neither homeowner nor hauler takes on the alkali addition responsibility, then the septage will have to be transported to WWTPs which can be geographically distant at great cost, even assuming such WWTPs have adequate capacity and agree to take the septage. Without a close and economical means to dispose treated septage, illegal dumping will abound.

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[22] U.S. ENVIRONMENTAL PROTECTION AGENCY, EPA GUIDELINE FOR LAND APPLICATION OF SEPTAGE, EPA/832-B-92-005 (Sep. 1993), at 18.

[23] *Id*. at 2.

As commented earlier, the TCEQ has had numerous opportunities in the last two decades to require individual permits for the land application of septage and chose not to. Again, both SB 1724 and HB 3642 in the recent Legislative Session, which would have eliminated the registration process for septage land application sites, imposing an individual permit requirement, did not pass out of their respective committees. There was simply no statewide support for this draconian change. State policy has been and continues to be in favor of the beneficial use of biosolids which is a form of recycling.[24] Subjecting registered sites to the contested case hearing process – for doing something which does not rise to the level of process and treatment - will not only thwart the State's recycling policy, but also cause the cost of doing this business to soar, forcing many small businesses to close. It could also likely result in unintended environmental damage or ripple effects because of the resulting pressure on related industries like OSSF installers, maintenance professionals, haulers and even WWTPs which also handle septage.

B. Proposed Rule Language

Commenters propose the following language changes to the current text of 30 TAC §§ 312.82(c)(2) and 312.83(b)(12) to clarify that the addition of lime is **not** a process or treatment that requires the owner/operator to obtain an individual permit but such practice remains authorized under a registration:

> The pH of domestic septage applied to agricultural land, forest, or a reclamation site must be raised to 12 or higher by alkali addition and, without the addition of more alkali, must remain at 12 or higher for a period of 30 minutes. <u>The addition of alkali is not processing or treatment that requires a permit under this chapter.</u>[25]

And similarly,

> The pH of domestic septage shall be raised to 12 or higher by alkali addition and, without the addition of more alkali, shall remain at 12 or higher for 30 minutes. <u>The addition of alkali is not processing or treatment that requires a permit under this chapter.</u>[26]

Sections 312.82(c)(2) and 312.83(b)(12) should be amended or clarified through guidance so that the addition of alkali on-site for pathogen and vector attraction reduction would not trigger a requirement to obtain an individual permit. Permits which are subject to expensive and lengthy contested case hearings and thwart the State's recycling goals are simply not warranted where the potential threat of harm to human health and the environment posed by this material is de minimis.

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[24] *Id.*

[25] 30 TEX. ADMIN. CODE § 312.82(c)(2).

[26] 30 TEX. ADMIN. CODE § 312.83(b)(12).

V. Harvesting and Shredding

Section 312.82(b)(3) establishes requirements for harvesting of food and cover crops for certain periods of time after sludge/septage application. The primary benefit of harvesting hay from a site is to remove the nutrients that have accumulated in the plant material and provide a means of balancing nutrient additions with the nutrients harvested.

However, shredding or mowing is *not* harvesting, but it serves a management purpose. For example, when a site is managed with a warm season and cool season annual grass, it may be necessary to plant the cool season grass at a time that does not coincide with harvesting or wait 30 days following a septage application to harvest. However, to achieve planting of the cool season grass season within the correct planting time frame and achieve successful germination, it can be beneficial to shred or mow the site without removing the hay. Likewise, in the spring when the cool season grass is starting to decline and the warm season grass is beginning to grow more vigorously, it may be appropriate to shred or mow the cool season vegetation without bailing hay to remove the standing plant material and give the warm season grass a better opportunity to compete. Shredding or mowing can also be used to control weeds, allowing the desired grass a better opportunity to compete with the less desirable plants. Furthermore, with shredding or mowing, the plant matter and any nutrients contained therein are returned to the soil creating an insitu mulch that benefits the crops on the site and only helps the beneficial reuse of biosolids later on. Thus, shredding or mowing is a basic management practice used for maintaining the site in a more optimum vegetated condition and it is not reasonable to restrict shredding as if it were some form of unauthorized harvesting from the site.

The site operator should be allowed to perform management of the site consistent with good agricultural practices. However, if the Executive Director amends the rules to regulate basic management practices like shredding or mowing, then there are many additional management practices that would have to be addressed including:

- Grazing management – controlling animal counts on sites that satisfy the timing requirements
- Prescribed burning -- to control weeds and reduce excessive accumulation of plant matter.
- Supplemental fertilizer application.
- Supplemental soil amendments (soil acidifier, minerals, etc.)
- Supplemental irrigation.
- Weed control using labeled herbicides.
- Pest control using labeled insecticides.
- *And many others.*

Commenters appreciate your consideration of these comments. If you have any questions or concerns, please do not hesitate to call me at (512) 494-5341.

Sincerely,

Helen S. Gilbert

cc: Mr. Brandt Klutts
Mr. Clayton Klutts